

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In Re: Pork Antitrust  
Litigation

File No. 18CV1776

19CV1578, 19CV2723

21CV2998

(JRT/HB)

Minneapolis, Minnesota

July 14, 2021

10:08 A.M.

BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM  
UNITED STATES DISTRICT COURT JUDGE  
**(STATUS CONFERENCE VIA VIDEO CONFERENCE)**

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10:08 A.M.

(In open court via video conference.)

THE COURT: This is 21-2998 multi district litigation. I don't have captions yet, so we're going to figure that out as we go along. We also have the former case 18-1776 and the other cases that are part of this that are part of the record.

I don't think we need to go through and note appearances today. That might take us a while. Heather has a handle on that, and we will make sure that we have appearances noted, and if she doesn't have your name down, then you get in touch with her. You should communicate directly with her.

The purpose this morning is really for the Court to get a handle on what is going on so we can start coordinating and get the process moving quickly for the new MDL and also coordinate as much as possible with prior cases.

So on my list really is to focus on what we need to do to get to the initial Case Management Order, some reasonable time limits here, and also to start coordinating discovery with the help of Judge Bowbeer.

Let me hear from everybody here who is wishing to speak. I think I noted here for -- well, maybe you can

1 tell me. Who is going to speak for the plaintiffs? Let's  
2 hear from you first on what needs to be done right away.

3 MR. KAPLAN: From the MDL plaintiffs or the class  
4 plaintiffs?

5 THE COURT: Let's go MDL first, please.

6 MR. KAPLAN: It's Robert Kaplan. We've exchanged  
7 briefing, and if we could have a couple of weeks, I think  
8 we could probably agree on most of the dates and the  
9 procedures and submit hopefully an agreed upon order to  
10 Your Honor. If not, we would note whatever differences  
11 there are.

12 THE COURT: Okay. All right. Anyone else in the  
13 MDL plaintiffs wish to say anything?

14 MR. GANT: This is Scott Gant. I represent  
15 Cisco, and I represent some other plaintiffs that will be  
16 filing. As Your Honor may have noted, there are over 80  
17 opt-outs from the class action. There was an opt-out  
18 notice recently filed, so I'm filing some additional cases.  
19 I know others are coming.

20 And we've proposed a schedule to the defendants  
21 to attempt to accommodate the expected incoming cases over  
22 the next weeks and months. So as Mr. Kaplan said, we would  
23 appreciate a couple of weeks to confer with the defendants.  
24 One of the issues about which we have disagreed is whether  
25 the MDL is going to be separate and coordinated, separate

1       formally but coordinated significantly with the existing  
2       action, which in our view is reflected in our papers.

3               The defendants seem to have a view that these  
4       matters should be collapsed, which I don't think was what  
5       the JPML did in its orders, but once we have that matter  
6       settled, I agree with Mr. Kaplan. It's just a matter of  
7       weeks and hopefully less for us to submit to you a proposed  
8       schedule for the MDL, which will be significantly  
9       coordinated.

10              And you will note, Your Honor, we proposed the  
11       same fact discovery cutoff for the MDL as exists in the  
12       current matter.

13              THE COURT: Okay. Do you have any idea,  
14       Mr. Gant, about the number of cases coming, or is that  
15       impossible to know?

16              MR. GANT: I will give you my best faith  
17       estimate, and you may know, Your Honor, the *Broiler Chicken*  
18       matter in Chicago is ongoing. It's similar in some  
19       respects. Many of the same counsel who appear for both  
20       plaintiffs and defendants are in this case and that case.

21              Many of the same entities that have opted out  
22       have filed their own cases in Illinois, which are over 150.  
23       So my best guess, Your Honor, is that we are going to end  
24       with several dozen, but I can't be more precise than that.

25              I think because in *Chicken* the opt-outs came over

1 the course of a few years. Mr. Kaplan and I were the first  
2 two DAPs to file in Chicago, and we did that three and a  
3 half years ago. There are still cases being filed here.

4 I think that was partly a function of the fact  
5 that there were very small settlements initially and no  
6 settlements, which of course is the time when people need  
7 to decide whether to opt out. Here, because JBS settled  
8 relatively early, and now there is a settlement with  
9 Smithfield, Your Honor, I think that people will make their  
10 decisions earlier.

11 So I think we won't hopefully face a situation  
12 where we have cases filed over years. I think it will be a  
13 matter of months for most or all the cases, and I think  
14 that will probably be a few dozen would be my best guess.

15 THE COURT: Okay. That's helpful.

16 Okay. Anyone else, plaintiffs, in the MDL that  
17 has a thought on this point?

18 How about the class plaintiffs?

19 MR. CLARK: Your Honor, Brian Clark for direct  
20 purchaser plaintiffs and for the most part speaking on  
21 behalf of the classes, though my colleagues Shana Scarlett  
22 and Shawn Raiter have a couple other comments.

23 We do think it would be helpful to confer. We  
24 haven't seen the new DAP proposal on things like  
25 depositions and such, so some coordination is obviously

1 going to be required. That is the entire advantage of an  
2 MDL, and coordinating them before you and Judge Bowbeer, we  
3 get those advantages of having the same judges dealing with  
4 the scheduling and discovery issues.

5 But a couple issues there that we thought were  
6 worth flagging for Your Honor just because they caused us  
7 some serious pause as we read through some of the  
8 coordination proposals from the MDL DAPs. This case has  
9 been going on for three years, and the classes, Puerto Rico  
10 and Winn-Dixie, have been in front of Your Honor litigating  
11 this case.

12 So there are existing DAPs that were already  
13 here, and the classes have been litigating in this case for  
14 three years before Your Honor, and we are starting  
15 depositions in a few months. We are 45 days from  
16 substantial completion of document production, and we need  
17 the case to stay on track and keep pushing it forward.

18 And these new direct action plaintiffs, they have  
19 chosen, as is their right, three years into the case to  
20 file. One of the DAPs that triggered the MDL actually was  
21 before Your Honor, if you check your docket, back in  
22 December. Then they were dismissed. Then they re-filed in  
23 Florida, triggered the MDL, and I think here they are again  
24 today in front of you.

25 In that whole time, we have been pushing the case

1 forward, and so we think this kind of fits a pattern that  
2 we just want to flag now early on in the case. When there  
3 is large numbers of DAPs in a case like this, that just  
4 causes some coordination issues that I think are worth  
5 putting out there.

6 The DAP counsel have been aware of this case for  
7 three years. It's probably a covered case in the media,  
8 and as with other large cases with large numbers of  
9 opt-outs, the DAPs have chosen to wait until after the  
10 motions to dismiss have been successfully defeated for the  
11 most part because there was Winn-Dixie and Puerto Rico  
12 here.

13 The modification of the pattern here we didn't  
14 see in other cases is this kind of side route to the MDL  
15 proceedings after the defeat of the motions to dismiss. I  
16 don't think anybody ever questioned the outcome of the MDL  
17 panel when the case has been proceeding this long, and  
18 certainly the MDL panel confirmed these cases are all the  
19 same and should all be in front of Your Honor.

20 Again, nothing precludes the new DAPs from doing  
21 what they did. I mean, that's their right, but waiting to  
22 file until the case is viable and off the ground has some  
23 consequences because now the case has proceeded in these  
24 three years, the classes, Puerto Rico and Winn-Dixie, have  
25 invested considerable time, money and effort to demonstrate

1       that these are viable cases.

2               So I say all that because there is a couple  
3       things in the proposals from the new DAPs that cause us  
4       pause. One of them is a proposal that the depositions,  
5       half of them be led by the new DAPs, who as far as I know  
6       don't even have the documents that have been produced, the  
7       hundreds of thousands of documents to date. Certainly I'm  
8       sure they will get them.

9               We want to start taking depositions on those  
10       documents because we have a class certification deadline of  
11       February 7 that we intend to meet, and so it is important  
12       to us not only to keep, you know, leading in the case and  
13       pushing it forward as we have done for three years, but not  
14       have kind of, I guess, a new person in the case come and  
15       disrupt our ability to litigate this case as we have done  
16       for the last three years.

17              But with all that said, we have been and will  
18       continue to be able to effectively, logically and equitably  
19       coordinate discovery with DAPs. As Mr. Gant said, we do  
20       that in lots of other cases. So we can certainly do that,  
21       but I guess that proposal kind of came in pretty loud to us  
22       for kind of coming into this case three years in.

23              I guess all that is really just another way of  
24       saying this is a moving train, and folks need to hop on it.  
25       I think that also certainly goes to the proposal to have

1 kind of a separate discovery track. I'm not entirely clear  
2 how that will proceed. If there is any proposal to delay  
3 those depositions after substantial completion September  
4 1st, it's not clear because we are going to have a window  
5 between September 1st and February 7th where there are some  
6 depositions we will be ready and must proceed on to meet  
7 that class certification date.

8 Again, just worth bearing in mind, different  
9 discovery protocols, depositions, Winn-Dixie and Puerto  
10 Rico were part of that. So it's kind of this weird  
11 artificial distinction that I guess has been attempted to  
12 be created here by the new DAPs and existing DAPs, and we  
13 all are plaintiffs who represent clients who allegedly were  
14 victims of a price fixing conspiracy for pork.

15 We all seek to prove that case, and so we need to  
16 from the get-go set it up to make it successful and also  
17 recognize that we are three years in to doing that. So the  
18 two things, kind of substantive things that I think would  
19 occur to the classes that we ought to do, substantively as  
20 we did in pork early on, having a single ECF number where  
21 we file all these cases and having a case caption, whatever  
22 it is, that lets us all file in the same matter number.

23 We see orders that are entered that might only  
24 pertain -- like we have done all along the way. For  
25 instance, we moved for final approval of the JBS settlement

1 on Monday. We just note on the case caption that that was  
2 only specific to the direct purchaser plaintiff case. So  
3 we think that's appropriate here and have a lot of  
4 efficiencies.

5 It can become very difficult to track different  
6 matter numbers, like Your Honor knows from the beef and  
7 cattle case where I think there is four matter numbers we  
8 file motions on each time and you enter orders on each  
9 time. So that I think is really important. However you do  
10 it, having a single number for all of these cases is  
11 important.

12 To the extent the Court today intends to address  
13 the new DAPs' proposals on depositions and other things, I  
14 think give us a little direction would be helpful on that.  
15 Certainly we will talk as we have done for years with these  
16 folks and figure it out, but that was the first we saw that  
17 struck us that it was a little off key, given we are three  
18 years in and about to start depositions.

19 So that's all I had. I think colleagues Shana  
20 Scarlett and Shawn Raiter have a couple comments on behalf  
21 of their clients.

22 THE COURT: Thank you, Mr. Clark.

23 Ms. Scarlett?

24 MS. SCARLETT: Thank you, Your Honor. Just a  
25 couple issues that are very particular to the indirect

1 purchaser class. The DAPs have come into this litigation  
2 and ask that there be two separate tracks, the MDL track  
3 and the non MDL track, and to us that presents a bit of a  
4 dilemma.

5 In other litigation, these exact DAPs have taken  
6 the position that the indirect purchasers who seek  
7 information through discovery from these DAPs that relate  
8 to pass-through and contact information for class members,  
9 that the indirect purchasers must seek this information  
10 through third-party subpoenas and have made the argument  
11 that because the *Chicken* MDL -- the *Chicken* proceedings are  
12 not a MDL that we're forced to get all of this information  
13 through nonparty subpoenas.

14 And that seems to be the procedure that they are  
15 setting up here in the pork litigation. They're acting  
16 under the pretense like this is the first day of  
17 litigation, when in fact they stopped the MDL. What the  
18 indirect purchasers ask is that the entire case be  
19 consolidated as an MDL so that we are able to do two  
20 things:

21 Number one, that we are able to seek data which  
22 relates to pass-through and which relates to our class  
23 motion on the same schedule as we need to bring the motion  
24 for class certification. You will note in the schedule  
25 they propose that they have the date for completion of

1 their structure data in January, with our class  
2 certification motions due in February.

3 That simply leaves us not enough time to use that  
4 data to perform the pass-through regressions necessary for  
5 a class cert motion. In addition, they also ask that,  
6 sorry, by their structuring of the MDL with the non MDL  
7 portion being the class plaintiffs, we'll also be forced to  
8 issue nonparty subpoenas to participate in any deposition  
9 of the DAP representatives.

10 In other MDLs, the DAPs have declined to allow  
11 the indirect purchasers to ask questions that relate to  
12 pass-through and have argued that we have to issue nonparty  
13 subpoenas for every deposition despite the fact that all of  
14 us are participating in most of the depositions, and this  
15 has created another substantial hurdle for the indirect  
16 purchaser classes.

17 So for that reason one of the things that we're  
18 asking today is that all of these cases are consolidated  
19 under the one MDL caption, and I would just point out that  
20 the consumer indirect purchaser action was the one first  
21 filed. We were the ones that filed in June 2018, and we  
22 are the lowest numbered case.

23 So for us to be excluded from participating in  
24 these late coming DAP actions is somewhat difficult for us  
25 to understand why the DAPs believe this is a reasonable

1 proposal, and I would just like to directly address as  
2 well, as my colleague Mr. Clark did, their request that the  
3 DAPs be able to lead half the depositions.

4 The direct action plaintiffs and the opt-outs  
5 have much smaller cases that they attempt to prove. They  
6 have very little interest in proving a conspiracy that  
7 impacts the entire market. They usually don't have a lot  
8 of interest in demonstrating common impact.

9 Many of their requests in other large MDLs relate  
10 to their individual salesperson that negotiated with the  
11 defendant and on the other side the individual defendant  
12 employee that negotiated with them. This is in direct  
13 contrast to what the class is trying to prove, which is a  
14 market mechanism and a broader impact at class  
15 certification.

16 To allow a DAP to take the lead on half the  
17 depositions would gravely prejudice the plaintiff classes  
18 from being able to demonstrate what they need to for class  
19 certification. In addition, the DAPs are hostile and in  
20 conflict with the indirect purchasers when it relates to  
21 pass-through.

22 So allowing these entities to step in and take  
23 the lead on half of the depositions where they're directly  
24 in conflict to what the indirect purchaser classes are  
25 trying to show in terms of pass-through through the

1 distribution channels would again be gravely prejudicial to  
2 the plaintiffs.

3 So I reiterate what Mr. Clark said. We would  
4 like a couple things. One, we want the schedule to stay on  
5 track. We are three years into this litigation. We spent  
6 an enormous amount of time reviewing the 800,000 documents  
7 produced. Substantial completion of documents is almost  
8 there.

9 We have all of our teams working incredibly hard  
10 to get us ready for depositions and to stay on the schedule  
11 that this Court and Judge Bowbeer have ordered. We would  
12 ask this Court to consolidate everything under the one  
13 caption as an MDL so we are able to use all the discovery  
14 tools available us.

15 To the extent that Your Honor can give us  
16 guidance on depositions and how you would like the  
17 plaintiffs to split the time, I think all of us would  
18 appreciate that clarity. Thank you.

19 THE COURT: Thank you, Ms. Scarlett.

20 Mr. Raiter, did you have something?

21 MR. RAITER: Your Honor, on behalf of the  
22 commercial indirect purchasers, we join in the comments  
23 from the consumers and the direct action, the direct  
24 purchaser plaintiffs in the class action cases. Mr. Finley  
25 from our group may have a comment about the timing of some

1 transactional data that the DAPs have proposed.

2 MR. FINLEY: Good morning, Your Honor. Blaine  
3 Finley of the commercial, institutional and direct  
4 purchaser plaintiffs. So I would like to address the Court  
5 about third-party discovery briefly.

6 COURT REPORTER: Mr. Finley? Mr. Finley, for  
7 some reason you are not coming across as loudly as everyone  
8 else did, and you need to slow down for that very reason,  
9 please. I am having a hard time. Could you please start  
10 over?

11 MR. FINLEY: Absolutely.

12 COURT REPORTER: Thank you.

13 MR. FINLEY: Good morning, Your Honor. My name  
14 is Blaine Finley of the commercial, institutional and  
15 direct purchaser plaintiffs, and I would like to address  
16 the Court on the subject of third-party discovery briefly.

17 My group has several subpoenas issued to DAPs,  
18 and these subpoenas preexist the formation of this MDL. In  
19 the schedule proposed to this Court by defendants, I noted  
20 that December 1st is currently set for the proposed  
21 (indiscernible due to audio malfunction) of structured data  
22 production.

23 And what my group would propose, and want to be  
24 included in the negotiation of, would be bringing forward  
25 that deadline in light of the February 7th class

1 certification deadline. Unsurprisingly, structured data,  
2 transactional datasets, that the direct action plaintiffs  
3 would produce would likely be material in my group showing  
4 the price impact to our class numbers, and so to -- in  
5 summary, would like to be included in any future  
6 negotiations about the schedule going forward, particularly  
7 as to the issue of the deadline for the production of  
8 structured data.

9 Thank you very much.

10 THE COURT: All right. Thank you. Before we  
11 turn to defendants, Mr. Gant, did you want to respond to  
12 anything?

13 MR. GANT: I did, Your Honor. Thank you.

14 A couple of points. One is, we did learn some  
15 lessons from the *Chicken* litigation, which as Ms. Scarlett  
16 corrected herself sometimes is erroneously referred to as  
17 an MDL, but it is not. That has caused a lot of  
18 complications, and that is what led me and others to seek  
19 an MDL in this case.

20 We have worked usually cooperatively with class  
21 counsel in the case, but we have had differences with them,  
22 and one of the differences we had was our role in taking  
23 depositions. We wanted to play in the *Broiler Chicken* case  
24 the role that we're contemplating here where we were equal  
25 in terms of the time that we were allotted at depositions.

1           In the *Chicken* case, the direct action plaintiffs  
2       now represent the majority of the commerce compared with  
3       the direct class, and I expect that likely will be the case  
4       here, too, as often is the case where there are a large of  
5       number of opt-outs. So our clients have exercised their  
6       due process rights to file their own cases.

7           Rule 23 and due process contemplate that direct  
8       action plaintiffs can file their cases at the time that  
9       they believe is appropriate, and that's what we did here.  
10      There is no game playing or effort to any -- I think  
11      Ms. Scarlett used the word "pretense." There is no  
12      pretense, no game playing.

13           We exercised the rights that we have. We don't  
14      want to be subordinated to a second class status role. Our  
15      clients have significant interests. We're among the  
16      largest purchasers, and we are and were fully prepared to  
17      litigate this out.

18           As you know, Your Honor, we asked to have this  
19      case proceed in a different forum, not because we don't  
20      want to be under your stewardship, and we're happy to be in  
21      front of you, Your Honor, but in part for the reasons that  
22      you're seeing today, which is that the classes want to  
23      relegate us to a subordinate status.

24           We want an equal status. We want to be partners  
25      with the classes in prosecuting the cases. Our interests

1 are substantially aligned. Ms. Scarlett's suggestion that  
2 we're somehow adverse to the indirect classes I don't think  
3 is accurate, but if she were right, then as a matter of  
4 logic her class is also adverse to the interests of the  
5 classes represented by Mr. Clark, Mr. Pouya and  
6 Mr. Bruckner, because the class representatives are also  
7 direct purchasers.

8 So in terms of the structure of the case, we're  
9 in the same position as they are vis-à-vis Ms. Scarlett.  
10 We have been able to work out in the *Chicken* case many of  
11 the issues that Ms. Scarlett referenced, like whether  
12 examinations can be conducted by the indirect classes but  
13 witnesses from DAPs.

14 We ended up entering into a stipulation there.  
15 We're happy to try and do that here. We're happy to try  
16 and come up with solutions, as we did in the *Chicken* case,  
17 through stipulations for document productions. Whether  
18 this is an MDL or not doesn't change the fact that the  
19 relationship between Ms. Scarlett's clients and the direct  
20 action plaintiffs were not parties to the same case.

21 Whether you consolidate or coordinate or whatever  
22 you do, we are third parties vis-a-vis the cases brought by  
23 the indirect classes against defendants, and the proper  
24 mechanism for obtaining discovery we believe is subpoenas,  
25 but we're happy to discuss that.

1 Fundamentally, Your Honor, we see, we represent  
2 large purchasers of these products. We elected to  
3 prosecute the case ourselves. We want to cooperate and  
4 coordinate with class counsel, and we don't want to  
5 interfere with the existing schedule. I said that in my  
6 initial comments, Your Honor.

7 Our proposed deadline for fact discovery is the  
8 same as exists currently and the schedule that was  
9 established by Your Honor in coordination with class  
10 counsel and defense counsel.

11 We will be ready to participate fully in  
12 depositions when those occur, and we're willing to  
13 cooperate and negotiate with class counsel in terms of who  
14 does what, but we want to be equal partners, and we want to  
15 have the opportunity to protect our clients' interests in  
16 prosecuting these cases and not be relegated to a  
17 subordinate or second class role.

18 MR. KAPLAN: Your Honor, Robert Kaplan just to  
19 follow up. I agree with what Mr. Gant said. As I said in  
20 the beginning, if we have a couple weeks, I think we can  
21 work out virtually all of these issues. I spoke to  
22 Mr. Finley yesterday. I told him, where he explained his  
23 issue, I said we will try to work with him.

24 We're not trying to hurt anybody's class  
25 certification motion, so we're ready to sit down and try to

1 work out something cooperatively, and I think 90 plus if  
2 not all of these issues can be worked out. So if you would  
3 give us a couple of weeks, I think we can make a lot of  
4 progress on these issues.

5 THE COURT: Well, Mr. Kaplan and Mr. Gant, do you  
6 favor a consolidation all into one case, or do you want  
7 coordination? What's your view?

8 MR. GANT: Your Honor, my view is that there  
9 should be significant coordination but not complete  
10 consolidation. First as a formal matter, and sometimes I  
11 get accused of trying to queue too closely to the rules,  
12 but it seems like class counsel are suggesting that their  
13 cases should be put into the MDL, and I don't think that's  
14 permitted as a matter of statute, and it's also not  
15 consistent with what the JPML order provided.

16 So I think whatever you do, my understanding of  
17 the statutory structure is, you can't put everything into  
18 the MDL, to the extent that someone is suggesting that. We  
19 believe that there should be significant coordination. I'm  
20 not necessarily opposed to Mr. Clark's suggestion of the  
21 creation of a new number, and that may have constituent  
22 parts.

23 It may have the MDL in it. It may have the prior  
24 case in it as well, and so for -- I don't want to create  
25 inefficiency or wasteful duplication in terms of having to

1 file in multiple dockets, but I do think it's important to  
2 continue to recognize that the MDL is separate, and there  
3 may be -- I think the wisest course is to have separate  
4 schedules because there may be things that affect the MDL  
5 that don't affect the other cases and vice versa.

6 So I think having separate schedules, even if  
7 they're entered under the same ECF number, makes some  
8 sense, but I'm sure Your Honor will have even better ideas  
9 than I do about the precise mechanics. The view of the  
10 DAPs, and I speak for everyone who has filed on this point,  
11 is that we should have significant amount of coordination  
12 but not complete consolidation, Your Honor.

13 THE COURT: Okay. Anyone else from the  
14 plaintiffs' side before I turn to defendants?

15 Okay. All right. Who is speaking first for  
16 defendants?

17 MR. ROBISON: Good morning, Your Honor. This is  
18 Brian Robison. I'm with Gibson, Dunn & Crutcher, and we  
19 represent Smithfield Foods, and I will be representing the  
20 collective group of defendants' position here today.

21 The defendants' calling card for how we integrate  
22 these new plaintiffs is efficiency. We want to be  
23 efficient in how we're managing the existing cases and how  
24 we integrate the new DAPs. A corollary to that is, we want  
25 to eliminate duplication. We don't want to have to keep

1 doing the same things over and over.

2 A lot of progress has been made in these cases.  
3 Mr. Clark went through some of the high level explanations  
4 there, but a lot of progress has been made. The parties  
5 have spent a lot of time negotiating the details of  
6 discovery, the scope of discovery. There is a lot of sweat  
7 equity involved in these cases, a lot of sweat equity  
8 invested by the parties but also by the Court.

9 The progress that has been made, the reason why  
10 we are just about six weeks away from the date for  
11 substantial completion of documents and data productions  
12 is, number one, active case management by Judge Bowbeer;  
13 and number two, the result of intense negotiations between  
14 the existing parties on the scope of discovery.

15 Judge Bowbeer has been hands on from day one.  
16 She was hands on during the preservation phase of the case,  
17 and she has been just as hands on during the discovery  
18 phase. We have had multiple status conferences. She has  
19 required multiple status reports. She has decided motions  
20 to compel. She has entered orders on stipulations where  
21 the parties could agree on the scope of discovery.

22 The parties have negotiated things like the  
23 custodian lists for both sides, the search terms that both  
24 sides would use in searching for e-mails, the date range  
25 for discovery, the scope of data productions, and we have

1 done this obviously for our benefit. The parties need to  
2 know the scope of discovery, so we're doing things once.

3 But we also had to do it for the benefit of  
4 thirds parties. You've heard a little bit about subpoenas  
5 for third parties. There have been dozens of subpoenas  
6 served by the existing parties on nonparties, and few of  
7 those nonparties had the exact same position I'm advocating  
8 today, they wanted to do things once.

9 These nonparties came back to the subpoenaing  
10 parties and said, we're happy to comply with the subpoena.  
11 We're going to negotiate the scope here and there, but  
12 we're concerned when you say you want things like sales  
13 data. We're concerned when you talk about pork. What do  
14 you mean by sales data, and what exactly is included in  
15 pork?

16 So the parties in the case had to reach agreement  
17 on the scope of sales data productions and the definition  
18 of pork, what exactly is going to be at issue in the case,  
19 and then we took that agreement to the third parties so  
20 that they could do their searches for e-mails and their  
21 searches for data once.

22 That's just an example of what the parties have  
23 had to do to get discovery to the point where we are now  
24 where we're just a few weeks away from substantial  
25 completion of document and data productions. We don't want

1 to waste the benefit of that.

2 We don't want to have to start over and  
3 renegotiate things that we've already negotiated. We don't  
4 want to have to go back to Judge Bowbeer and talk about the  
5 scope of discovery.

6 There are obviously going to have to be some  
7 modifications. We're not unrealistic here. We realize  
8 we're going to have to add search terms for parties like  
9 Cisco and Topco and some of these new direct action  
10 plaintiffs. So we realize that there will be additional  
11 discovery at some point of some kind.

12 But we do not want to do what we see in the new  
13 DAPs' proposal where it does look like they're trying to  
14 re-trade some of the agreements on discovery and they are  
15 trying to rewrite some of Judge Bowbeer's orders on what  
16 the limits of discovery are going to look like.

17 We also agree with Mr. Clark's point about the  
18 need for there to be one ECF number and the point that  
19 Ms. Scarlett made about consolidation. On consolidation,  
20 Your Honor, it is important to understand this has already  
21 been addressed in the pre-existing cases.

22 There is a Case Management Order, ECF 85, that  
23 was entered early on that talked about consolidation of  
24 future cases. That order said if there were future cases  
25 transferred to this Court that involved substantially

1 similar allegations of an antitrust conspiracy in the pork  
2 industry, those cases would be consolidated with the  
3 existing cases.

4 We used that principle later on, ECF 644. Judge  
5 Bowbeer had a status conference, I think it was the summer  
6 of 2019, where everybody discussed the need to get the  
7 Winn-Dixie case and the Puerto Rico case consolidated with  
8 the class cases. There had been a lot of confusion up to  
9 that point.

10 When an order was entered, was it entered in  
11 every case or just certain cases? When there was a status  
12 conference, was it going to involve a few cases or all  
13 cases? When there were pleadings filed, did they have to  
14 be filed once or five times?

15 So Judge Bowbeer did the parties a favor there by  
16 clearing that up and consolidating everything for  
17 administrative purposes only into one matter, and that's  
18 what we think should happen here. If we look at the MDL  
19 transfer order, the original transfer order on June 9th,  
20 what the MDL panel said was, it was sending the cases to  
21 Your Honor's court for consolidated or coordinated  
22 proceedings.

23 The way I read that order, the MDL panel left it  
24 up to Your Honor, and probably Judge Bowbeer as well, as to  
25 how exactly to integrate the cases coming through the MDL

1 process with the cases that have been here for three years  
2 now. So we think for administrative purposes these really  
3 do need to be consolidated. It will be much easier on the  
4 Court to have one filing, rather than five or six.

5 It will be much easier on the parties to  
6 understand which orders apply in which cases, which status  
7 conferences are going to cover which cases, those sorts of  
8 details. Again, this all comes back to efficiency and  
9 wanting to do things once rather than multiple times.

10 I agree with everything that has been said about  
11 the need for meet and confers. Maybe some of this can be  
12 hashed out. This idea of whether there is going to be  
13 separate tracks for the MDL cases and the preexisting  
14 cases, whether they're going to be consolidated and  
15 coordinated in some amorphous fashion, I think that's an  
16 important issue we probably need to hash out with Judge  
17 Bowbeer on a status conference.

18 THE COURT: All right. Anyone else from the  
19 defense, or were you speaking for everyone, Mr. Robison?

20 MR. ROBISON: Your Honor, I believe I'm speaking  
21 for everybody on the defense side today.

22 THE COURT: All right.

23 Anything else from plaintiffs that you wish to  
24 respond to?

25 MR. GANT: No, Your Honor. Thank you.

1 THE COURT: Okay. Great. All right. Well, we  
2 need to get this moving quickly, and I want to move it as  
3 quickly as possible in coordination with both the existing  
4 cases and the new MDL cases and whatever else comes into  
5 the MDL.

6 I think the idea of having, for administrative  
7 purposes, one ECF account for filing is a good idea. It's  
8 a lot simpler, and we won't have confusion. So we will  
9 make sure we set that up.

10 Here's what I would like to do: I would like to  
11 see an additional Case Management Order proposed for the  
12 MDL. Is a two-week period enough, or do you need more time  
13 for that, Counsel?

14 MR. GANT: Speaking for DAPs, two weeks we  
15 believe is sufficient, Your Honor. Obviously if we find  
16 that that's not enough, we will come back to you and let  
17 you know, but my expectation is that that will be  
18 sufficient.

19 Thank you.

20 THE COURT: Okay. All right. Ms. Scarlett?

21 MS. SCARLETT: Two weeks would be sufficient,  
22 Your Honor.

23 Thank you.

24 THE COURT: Okay. Let's have a draft in two  
25 weeks. If there are aspects of it that can't be determined

1 by the parties, you can write short briefing materials on  
2 that, and I will decide right away. I would like this  
3 order to be as closely resembling the order in the existing  
4 case as possible.

5 To me it makes no sense to proceed on separate  
6 tracks except on issues that are peculiar to a particular  
7 case and not the other. So I would like to see this as  
8 close as possible to the existing Case Management Order,  
9 and if there is a need to amend the existing Case  
10 Management Order to accommodate the addition, additions  
11 into the MDL, we can do that.

12 But I would prefer not to do that, and we can  
13 address the particulars of who does what at depositions  
14 after we get the Case Management Order in place.

15 Does that sound okay?

16 MR. KAPLAN: Yes, Your Honor.

17 MR. GANT: Yes, Your Honor, and just to clarify  
18 to make sure we are all working consistent with what you  
19 would like us to do, this would be a Case Management Order  
20 for the MDL. You asked Ms. Scarlett if that was okay. I  
21 just want to make sure there is no confusion. Obviously  
22 her clients are not in the MDL.

23 I fully agree we should be conferring not only  
24 with defendants who are in the MDL but with the classes who  
25 have an interest in the structure of the MDL, but I just

1 wanted to make sure we were on the same page that what you  
2 want is a companion or supplemental order for the MDL  
3 itself and that we leave intact or modify slightly the  
4 existing schedule as needed.

5 Is that what you are suggesting, Your Honor?

6 THE COURT: That's exactly what I'm suggesting.  
7 The only reason I asked Ms. Scarlett is I noticed her mute  
8 button was off, so I suspected she had something to say. I  
9 try to check out the mute buttons, although I apologize for  
10 not noting my own at the beginning of the hearing today.  
11 Sometimes that happens.

12 MS. SCARLETT: Your Honor, there is a reason why  
13 I unmuted is just because the schedule in the DAP case does  
14 impact the class cases. Because of that deadline for  
15 structured data, that dramatically impacts our ability to  
16 prepare for class certification and keep on track in our  
17 cases.

18 For that reason, the classes would like to be  
19 included and have some input on that.

20 MR. KAPLAN: Your Honor, I said that I spoke to  
21 Mr. Finley yesterday, and it applies to Ms. Scarlett.  
22 We're going to work that out. We're not going to interfere  
23 with their class certification.

24 THE COURT: Okay. Good. And once we get that in  
25 place, then we can address some other issues relative to

1 the MDL. If we need coordinating counsel, those kinds of  
2 issues, we can address that, and you can address it in the  
3 draft Case Management Order if you wish, but I would like  
4 to get the schedule on track right away.

5 That's the critical point for getting moving. My  
6 anticipation is, you know, not consolidating the two sides  
7 of this case into one but coordinating it very closely so  
8 that we're basically on the same track for everything.  
9 That would be my intent.

10 All right?

11 MR. GANT: Thank you, Your Honor.

12 THE COURT: Anything else anyone has today? And  
13 I will coordinate also with Judge Bowbeer so we're on the  
14 same path here as well. So I appreciate your joining me  
15 this morning and getting me up to speed on where we're at.  
16 If I could have that draft order two weeks from today, I  
17 would appreciate it.

18 If you run into difficulties or there is anything  
19 else, you know, just be in touch, and we'll take care of  
20 it. All right?

21 MR. GANT: One final question, Your Honor. How  
22 would you like it submitted? You referred to it as a  
23 draft. So you want us to file it on the docket or submit  
24 it to chambers?

25 THE COURT: Submit it to the chambers e-mail box.

1 MR. GANT: Will do. Thank you, Your Honor.

2 THE COURT: And we'll work at making sure we have  
3 an order relative to a single filing for everything. All  
4 right?

5 MR. KAPLAN: Thank you, Your Honor.

6 THE COURT: Okay. Thank you, everyone.

7 **(Court was adjourned.)**

8 \* \* \*

9 I, Kristine Mousseau, certify that the foregoing  
10 is a correct transcript from the record of proceedings in  
11 the above-entitled matter.

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15 Certified by: s/ Kristine Mousseau, CRR-RPR  
16 Kristine Mousseau, CRR-RPR

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